In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 692

RING CONSTRUCTION CORPORATION, *Petitioner*

v.

THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 19) is reported at 102 F. Supp. 569.

JURISDICTION

The judgment of the Court of Claims was entered on February 5, 1952 (R. 29). The petition for a writ of certiorari was filed on April 7, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether a prior decision of the United States Court of Appeals for the District of Columbia Circuit in this same controversy, which was denied review by this Court on a previous petition for a writ of certiorari, is *res judicata* of the dispute.

STATUTES INVOLVED

Section 403(e) of the Renegotiation Act (Act of April 28, 1942, 56 Stat. 226, 245, 246), as amended by Section 701(b) of the Revenue Act of 1943 (Act of February 25, 1944, 58 Stat. 21, 78, 86-87) is set forth in the Appendix, *infra,* pp. 9-11. The entire Act and its various amendments are set forth in the Appendix to the Petition at pp. 16-56.

STATEMENT

This suit arises out of the renegotiation by the Secretary of War of two contracts between petitioner and the United States for the construction of certain buildings at Camp McCoy, Wisconsin. The relevant facts are not in dispute and are as follows:[1]

Final payment was made on the contracts subsequent to the enactment of the Renegotiation Act (Act of April 28, 1942, 56 Stat. 226) (R. 20). In

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[1] Because this dispute is clearly *res judicata,* we have set forth only the history of this litigation and not the underlying facts. The latter are set forth in our Brief in Opposition to a previous petition filed in this same controversy, No. 656, October Term, 1949, certiorari denied, 339 U.S. 943.

December 1943, the Secretary of War, acting pursuant to Section 403(c) of that Act, as amended, determined that petitioner should refund $1,365,000—less tax credits—to the Government as excessive profits earned on the contracts. Petitioner, pursuant to Section 403(e) of the Act, as amended by Section 701 of the Internal Revenue Act of 1943 (58 Stat. 21, 78), instituted a proceeding in the Tax Court for a redetermination of the amount, if any, of the alleged excess profits (R. 20). Petitioner argued in the Tax Court not only that he had not received excessive profits but that the Renegotiation Act could not constitutionally be applied to the fact situation in this case (R. 11). The Tax Court held that the Act, as applied, was constitutional and adjudged that petitioner had received excessive profits in the sum of $1,208,965.13, less tax credits, or a total of $210,479.31 (R. 20, 21, 8 T.C. 1070).

Petitioner sought review of the Tax Court's decision in the United States Court of Appeals for the District of Columbia Circuit (R. 21). The Court of Appeals held that it was without jurisdiction to review the Tax Court's decision except insofar as that Court had ruled on the constitutionality of the Renegotiation Act. It affirmed the Tax Court's holding that the Act was constitutional as applied to these contracts. *Ring Construction Corp.* v. *Secretary of War,* 178 F. 2d 714. Petitioner thereupon filed a petition for a writ of

certiorari in this Court, which was denied on April 24, 1950, 339 U.S. 943. That petition presented substantially the same questions which are presented here.

Prior to the redetermination by the Tax Court, the United States brought suit in the United States District Court for the District of Minnesota to collect from petitioner the amount determined by the Secretary of War to be due as excessive profits. Proceedings on that suit were stayed pending the outcome of the Tax Court litigation. After the denial of certiorari by this Court in the Tax Court proceeding, the District Court held that the Court of Appeals' decision was *res judicata.*[2] *United*

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[2] The proceedings in the District Court were somewhat complicated but there can be no question that the court properly passed on the question of *res judicata:* After the Tax Court's determination, while the appeal to the Court of Appeals was pending, petitioner paid to the United States the principal of the amount determined by the Tax Court to be due, but did not pay any interest. At the time that payment was made, both parties agreed that it was paid under protest, preserving any rights petitioner might have to recover it, or any part of it. The United States thereupon moved to dismiss its suit in the District Court, except insofar as it claimed interest, and petitioner asserted a counterclaim for the recovery of the amount paid. In the decision reported at 96 F. Supp. 762, the District Court dismissed the counterclaim to the extent that it exceeded the amount of interest sought by the United States, on the ground that it could not award an affirmative judgment against the United States on a counterclaim, and dismissed the counterclaim as a whole, to the extent that it was intended as a defense to the Government's claim for interest, on the ground that the Court of Appeals' decision was *res judicata.*

States v. *Ring Construction Corp.*, 96 F. Supp. 762.

Petitioner did not appeal from the District Court judgment, but brought suit in the Court of Claims (R. 1). The Court of Claims also held that the decision of the Court of Appeals was *res judicata* (R. 28).

ARGUMENT

This is the second attempt by petitioner to obtain review in this Court of the decision of a lower court in this dispute. The petition should be denied because the decision of the Court of Appeals for the District of Columbia Circuit, which was previously denied review by this Court, is *res judicata* of the issues involved, and, as was the case with the earlier petition, because it does not present questions which call for review by this Court.

1. This dispute demonstrates well the wisdom of the doctrine of *res judicata*. Petitioner has had its day in court. Indeed, it has already been in five courts, including three trial and two appellate courts, on precisely the same case during the past eight years. It has presented all the arguments which are made in this petition to this Court in a previous petition, which was denied, 339 U.S. 943. Petitioner has argued its case in the Tax Court, 8 T.C. 1070, in the Court of Appeals for the District of Columbia Circuit, 178 F. 2d 714, in this Court on the previous petition for a writ of certiorari, 339 U.S. 943, in the District Court for the District of Minnesota, 96 F. Supp. 762, and in the Court

of Claims below, 102 F. Sup. 569. The decision of the court below, that the prior judgment of the Court of Appeals for the District of Columbia Circuit, which was denied review by this Court, is *res judicata,* is clearly correct. In addition, the prior judgment of the Minnesota District Court is also *res judicata.* Petitioner is twice barred from litigating its claim in this proceeding.

2. Whatever arguments we might make on the merits in this Brief were made in our Brief in Opposition to the prior petition for a writ of certiorari (see Brief for the Respondent in Opposition in No. 656, October Term, 1949, pp. 8-20). If this Court should feel any need to examine the merits of petitioner's contentions, our arguments are fully set forth in that Brief. In short, they are these:

(a) Insofar as petitioner challenges the constitutionality of the application of the Renegotiation Act to contracts entered into prior to the effective date of that Act, its arguments are foreclosed by the decision of this Court in *Lichter* v. *United States,* 334 U.S. 742, where this Court held such an application of the Renegotiation Act to be constitutional.

(b) There is ample authority to sustain the constitutionality of the grant of exclusive jurisdiction to the Tax Court. See, *e.g., Crane* v. *Hahlo,* 258 U.S. 142; *Hilton* v. *Merritt,* 110 U.S. 97; *Passa-*

vant v. *United States*, 148 U.S. 214; *United States* v. *Ju Toy*, 198 U.S. 253; *Oceanic Navigation Company* v. *Stranahan*, 214 U.S. 320; cf. *Williamsport Co.* v. *United States*, 277 U.S. 551; *Heiner* v. *Diamond Alkali Co.*, 288 U.S. 502; see, also, *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 303-304; *Estep* v. *United States*, 327 U.S. 114, 120, 122-123; *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 76-82 (Brandeis, J., concurring). Moreover, we think that, although the issue was not raised there, the decision in *Lichter* v. *United States*, *supra*, contains an implicit approval of the grant of exclusive jurisdiction to the Tax Court.

3. The alleged conflict between the decision of the Court of Appeals for the District of Columbia Circuit, 178 F. 2d 714, which was held by the court below to be *res judicata* of this dispute, and the decision of the Court of Appeals for the Ninth Circuit in *French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560, is no reason for granting review here. Petitioner seeks to challenge the constitutionality of the grant of exclusive jurisdiction to the Tax Court. The Court of Appeals for the District of Columbia Circuit has held that the grant was valid, but did not bar the Court of Appeals from considering constitutional or jurisdictional issues on appeal. The Court of Appeals for the Ninth Circuit in the *French* case, *supra*, held that because the Tax Court had exclusive juris-

diction, no court could review its decision even on questions of jurisdiction or constitutionality. Under the decision of either Court of Appeals petitioner could not prevail, and the final disposition would have been the same in whichever court petitioner had sued. The District of Columbia Circuit affirmed the Tax Court on the constitutional issue and refused to consider the other issues; the Ninth Circuit would have dismissed the appeal entirely. Insofar as this case is concerned, there is, therefore, no conflict between the decisions of the Courts of Appeals which calls for solution.

CONCLUSION

For the reasons set forth above, we respectfully submit that this petition for a writ of certiorari should be denied.

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MAY, 1952

APPENDIX

Section 403(e) of the Renegotiation Act, as amended by Section 701(b) of the Revenue Act of 1943 (Act of February 25, 1944, 58 Stat. 21, 78, 86-87) provides as follows:

> (e) (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers

and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115(a), 1116, 1117(a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c)(2).

(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a)(5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits,

which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

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